85-461 (1)

Supreme Court, U.S.
FILED
SEP 16 1985
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of The United States

October Term, 1986

No.

CONTROL DATA CORPORATION,

Petitioner,

VERSUS

C. E. SERVICES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Can *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), be properly read to permit exclusion of a competitor which provides identical services from the relevant market definition under Section 2 of the Sherman Act, 15 U.S.C. § 2?

2. Where undisputedly identical services are involved should summary judgment dismissing claims brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, be precluded merely by establishment of some of the indicia of a submarket set forth in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)?

LIST OF PARTIES

Control Data Corporation, Petitioner

C. E. Services, Inc., Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion and judgment of the district court are set forth in Appendix A and are not reported. The opinion of the Court of Appeals is reported at 759 F.2d 1241 (5th Cir. 1985). A corrected copy of the slip opinion issued May 13, 1985, is set forth in Appendix B. The Judgment of the Court of Appeals dated May 13, 1985, is set forth in Appendix C. The order denying Control Data Corporation's Petition for Rehearing dated June 18, 1985, is set forth in Appendix "D".

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on May 13, 1985. Control Data Corporation's Petition for Rehearing was denied on June 18, 1985. The

jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

APPLICABLE STATUTE

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This is a case brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, alleging monopolization and attempted monopolization of the market for maintenance of IBM 360 and 370 computers in the geographical area comprising Dallas and Tarrant County, Texas. Jurisdiction in the district court was invoked under 28 U.S.C. § 1331. At issue is the appropriateness of the conclusion by the Court of Appeals for the Fifth Circuit that the relevant product/service market could be defined to exclude IBM even though it is undisputed that IBM provided services identical to those provided by the parties and other competitors.

Respondent C. E. Services, Inc. ("CES"), was organized and staffed by former Control Data Corporation ("CDC") employees. In 1978 CES began competing with CDC in providing maintenance services on IBM 360 and 370 computer systems in the Dallas/Fort Worth area. Several companies provide such services in the Dallas/Fort Worth area. IBM provided computer maintenance services for over 60 percent of

the IBM 360 and 370 computers in the alleged relevant geographic market, CDC provided maintenance services for approximately 25 to 30 percent, and other competitors serviced the remainder. The services which IBM provided were identical to the services provided by CDC and other IBM 360 and 370 computer maintenance companies. Moreover, IBM set the prices and technical standards for computer maintenance services in the industry.

Even though IBM provided identical services, CES argued there was a relevant submarket comprised of companies other than IBM which service IBM 360 and 370 computers. The district court rejected this argument, concluded IBM must be included in the relevant market and dismissed CES' Section 2 claims on the ground that CDC's small market share precluded a finding of monopoly power essential to establishing a violation of Section 2. The district court concluded that CDC's small market share, especially in light of IBM's commanding position in the market, was fatal to CES' antitrust claims.

The Court of Appeals for the Fifth Circuit rejected this finding. Relying on this Court's decision in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962), it held that notwithstanding the fact IBM and the so-called "third party maintenance" companies provided identical services there were sufficient indicia of a relevant submarket to preclude summary judgment on the § 2 claims. Requesting review of the decision by the Court of Appeals for the Fifth Circuit, Control Data Corporation files this Petition.

ARGUMENT

A. Introduction.

Section 2 of the Sherman Act 15 U.S.C. § 2 makes it unlawful "to monopolize or attempt to monopolize, . . . any part of the trade or commerce." "A monopolization offense has two ele-

ments: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). On the other hand, to prevail on an attempt to monopolize claim a party must establish: (1) the existence of a specific intent to achieve a monopoly; (2) conduct directed toward the achievement of the monopoly; and (3) a dangerous probability of success. *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951). As Judge, now Justice, Stevens stated in *Kearny & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 597, 598 (7th Cir. 1971), *cert. denied,* 404 U.S. 1066 (1972), determining a violation of Section 2

> requires an appraisal of the alleged offender's ability to achieve the forbidden result. In an anti-trust context we must consider the firm's capacity to commit the offense .... The ultimate concern is the firm's actual or threatened impact on competition in the relevant market.

Thus, to establish a violation of Section 2 a party must establish the requisite market power.[1]

Because the relevant market provides the framework against which monopoly power must be measured, defining the relevant product and geographic markets is a threshhold requirement under § 2. *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980); *Spectrofuge Corp. v. Beckman Instruments,* 575 F.2d 256, 276 (5th Cir. 1978). The parameters of the relevant market are a factual issue. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 979 (5th Cir. 1979).

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[1] This Court has defined monopoly power as "the power to fix prices and exclude competition." *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-595 (1975).

In the instant case, the District Court determined the relevant market was all companies which provided maintenance services for IBM 360 and 370 computers in the Dallas-Tarrant County area. It was undisputed that IBM controlled over 60 percent of the market, Control Data controlled approximately 25 to 30 percent of the relevant market and other competitors controlled the remainder. The District Court concluded that Control Data's low market share, especially in light of IBM's commanding position in the market, was fatal to CES' Section 2 claims.

In the Court of Appeals, CES challenged the District Court's market definition. Relying on *dictum* in this Court's decision in *Brown Shoe,* CES claimed the District Court failed to identify a relevant submarket comprised of providers of third party maintenance (i.e. companies other than IBM which maintain IBM computers). The Court of Appeals accepted CES' argument, noting that although IBM offered services identical to those provided by third party maintenance companies, there were sufficient indicia of a relevant submarket to warrant reversal of the District Court's judgment. The *Brown Shoe dictum* relied upon by the Fifth Circuit to determine a submarket is erroneous and confusing. It has spawned decades of costly and time-consuming litigation where defendants do not possess the degree of market power necessary to affect competition. The Court should therefore reexamine the *dictum* in *Brown Shoe* and clarify for litigants and the lower courts the appropriate means of determining the relevant product market.

B. Brown Shoe Should Not Permit Exclusion Of a Competitor Which Provides Services Identical To Those Included Within The Relevant Market Definition.

In *Brown Shoe* the Court identified two distinct but related tests for determining whether products compete with each other and thus must be included within the definition of the relevant market. The tests are reasonable interchangeability of

use and cross-elasticity of demand. *Brown Shoe,* 370 U.S. at 325.

> Both tests are similar in that each emphasize the interchangeability of products as the principal consideration in delineating the relevant market . . . The test of reasonable interchangeability emphasizes two factors . . . (1) (end) use or uses, and (2) physical characteristics.
>
> The test of cross elasticity stresses the factor of price. The responsiveness of the sales of one product to price changes of the other may . . . determine the cross-elasticity of demand between the products.

16B Von Kalinowski, *Antitrust Laws and Trade Regulation,* § 8.02[2] at 8.15-8.18.1. (ed. 1985) A party may satisfy either test to establish the relevant market.

The *Brown Shoe* Court also noted in dictum,[2] however:

> [t]hat within this broad market, well-defined submarkets may exist which . . . constitute product markets for antitrust purposes. *United States v. E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indices as industry or public recognition of the submarket as a separate economic entity, the product's peculiar

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[2] The quoted language is clearly *dictum* because in *Brown Shoe* the Court upheld the district court finding that there were three relevant markets: men's, women's and children's shoes. The Court rejected Brown Shoe's argument that further delineations should be made based on price/quality and age/sex distinctions within those relevant markets. The Court refused to make a distinction based upon price where the products were essentially the same, holding this took an "unrealistic" view of the market. 370 U.S. at 326. Thus, the language regarding a relevant submarket was unnecessary to the decision in the case and thus has no binding precedential value.

> characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325. [footnotes omitted] The Court of Appeals relied on this passage in concluding that the relevant market could be defined to exclude IBM even though IBM provides services identical to those included within the relevant market definition.

Because the notion of a submarket has no intellectual or practical merit, it has been severely criticized. For example, one commentator has stated that by introducing the notion of a submarket, "[t]he Court . . . added a new level of complexity to the definition of relevant markets in antitrust cases and opened the door to three decades of inconsistent and often indefensible judicial decisions." Maisel, *Submarkets in Merger and Monopolization Cases,* 72 Geo. L.J. 39 (1983). In a decision following *Brown Shoe,* Justice Harlan suggested that the idea of submarkets would lead to attempts by litigants and courts to do precisely what the respondent and the Court of Appeals did in this case, i.e., to "create some market . . . out of bits and pieces of real ones." *United States v. Continental Can Co.,* 378 U.S. 441, 477 (1964) (Harlan, J. dissenting). Another commentator has described the passage as both "misleading and erroneous," Upshaw, *The Relevant Market in Merger Decisions,* 60 Nw. U.L. Rev. 424, 461 (1966), and predicted as early as 1966 it would lead to decisions incongruous with the purposes of the antitrust laws by encouraging litigants to parse the relevant market so narrowly that it does not accord with economic reality.[3]

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[3] The notion of a relevant submarket can best be understood as one view in a conflict which developed in antitrust jurisprudence in the 1950's and early 1960's. At that time the Court offered conflicting opinions as to whether the "relevant market" concept as used in cases decided under the Sherman Act was coterminous with the

That such confusion has been created is not surprising because the submarket idea is at odds with the purposes of the Sherman Act.

> There is no economic justification for bringing the antitrust laws to bear on competition in such narrow markets. Physical differences in products, or perceived differences resulting from brand identification or advertising, exist throughout the economy and confer competitive advantages on many producers. When interchangeability of use is high, however, those advantages are small. Product differentiation may allow companies to set prices slightly above marginal cost, but if consumers are ready to shift to effective substitutes in response to changes in relative prices or product improvements, the market power of those firms will be limited.

Maisel, 72 Geo. L.J. at 41.

Interestingly, the submarket idea reflects a position which this Court has subsequently rejected, i.e., that the definition of the relevant market differs depending upon whether the examination of the relevant market is undertaken under §§ 1, 2 of the Sherman Act or § 7 of the Clayton Act. *United States v. Grinnell*

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market analysis used to determine a "line of commerce" under § 7 of the Clayton Act. In some decisions the Court suggested that in cases brought under § 7 narrower markets could be drawn because the purpose of the 1950 amendments to § 7 was to impose a stricter test for determining the legality of mergers under § 7 than under §§ 1, 2 of the Sherman Act. Subsequent opinions by the Court, however, held that the more rigorous standard did not affect the definition of the relevant market. The dictum in *Brown Shoe,* however, bears the mark of this rejected proposition and has spawned confusion and error in the definition of the relevant market under § 2 of the Sherman Act. See generally, Upshaw, *The Relevant Market in Merger Decisions,* 60 Nw. U.L. Rev. 424 (1966); MacLeod, *The Relevant Product Market After Brown Shoe: A Framework of Analysis for Clayton and Sherman Act Cases,* 12 Loy. U. Chi. L.J. 321 (1981).

Corp., 384 U.S. 563, 573 (1966). ("We see no reason to differentiate between line of commerce in the context of the Clayton Act and part of commerce for purposes of the Sherman Act.") Because the Court has not clearly repudiated the relevant submarket notion, however, the lower courts continue to utilize it, and litigants have repeatedly filed § 2 claims under circumstances where there is no realistic possibility a defendant possesses the degree of market power sufficient to establish a violation of § 2. MacLeod, 12 Loy. U. Chi. L.J. at 356, 357.

The instant case fully demonstrates the irrational limits to which the *Brown Shoe* notion of a relevant submarket definition is susceptible. The services provided by IBM and the other so-called third-party maintenance providers were identical. *C.E. Services, Inc. v. Control Data Corp.*, slip op. at 4301 (5th Cir. May 13, 1985) (attached as Appendix B). Because IBM sets the standards for service in the industry, to compete effectively the other maintenance service companies must match the quality of IBM's services. Under any rational interpretation of the reasonable interchangeability test for determining the relevant market the services of all maintainers of IBM 360 and 370 computers must be included in the same market.[4]

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[4] Several cases (all involving IBM compatible peripherals) can be cited in support of the proposition that at least IBM, if not all CPU manufacturers, should be included in the relevant market definition. Those cases hold, at the very least, that the manufacturer who created the market, and at one time dominated 100% of the market, should be included in the market definition. Several of the cases go so far as to say that the plaintiffs, who wished to limit the market to IBM compatible equipment, also had to consider competition from non-IBM compatible equipment, which, the courts say, can be modified to interface with IBM CPU's with relative ease. *See Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975) (all peripheral products); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D.Cal 1978) (plug-compatible disk drives, etc.); *Transamerica Computer Co. v. IBM*

Brown Shoe should not authorize excluding from the relevant market definition, an actual competitor which provides identical services and sets the price and standards for the services in the industry. The Court should take this opportunity (1) to correct the misleading notion of a relevant submarket set forth in *Brown Shoe,* (2) to clarify further the appropriate considerations for determination of the relevant market set forth in *Brown Shoe,* and (3) to reverse the decision by the Court of Appeals which authorizes exclusion from the definition of the relevant market a competitor which provides identical services.

C. Summary Judgment Dismissing Claims Brought Under § 2 Of The Sherman Act Should Not Be Precluded Where Undisputedly Identical Services Are Involved Merely By Establishment Of Some Of The Indicia Of A Submarket Set Forth In Brown Shoe Company v. United States, 370 U.S. 294 (1962).

In *First National Bank of Arizona v. Cities Services Co.,* 391 U.S. 253 (1968) this Court held that antitrust cases, despite their complexity, were not immune from summary judgment treatment stating:

> To the extent that petitioner's . . . argument can be interpreted to suggest that Rule 56 should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations we decline to accept it.

391 U.S. at 289-90 (1968).

Corp. 481 F. Supp. 965 (N.D.Cal. 1979) (general purpose electronic digital computer systems). In the instant case, perhaps the relevant market should be defined more broadly than maintainers of IBM systems, but there can be no doubt that IBM is at the heart of the market and cannot be excluded.

The Courts of Appeals have noted that given the complexity and protracted nature of antitrust litigation, society clearly benefits from the early termination of baseless claims. *Paul Kadair, Inc. v. Sony Corp. of America,* 694 F.2d 1017, 1031 (5th Cir. 1983); *Solomon v. Houston Corrugated Box Co.,* 526 F.2d 389 (5th Cir. 1976).

> [T]he very nature of antitrust litigation would encourage summary dispositions of such cases when permissible.
>
> Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation. If a trial would serve no useful purpose summary judgment is proper.

Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978).

The Sherman Act is designed to protect competition, not competitors. *Brown Shoe,* 370 U.S. at 320. Section 2 is aimed at parties which have monopoly power, i.e., the power to control prices and exclude competition. Because submarket analysis does not identify parties with the requisite market power to violate Section 2, society must bear the extraordinary cost of a fruitless exercise which will provide no economic benefit to consumers.

> "The economic costs of singling out firms in narrow markets for antitrust scrutiny — the costs of defining submarkets limited to firms that make physically distinct or otherwise separable products — will outweigh the benefits. Consumers of products in a "submarket" have no need for special antitrust protection; they are already protected against price increases by their ability to shift to reasonably interchangeable products outside of that narrow mar-

> ket. Submarket analysis . . . may chill procompetitive behavior by larger firms in those "markets."

Maisel, 72 Geo. L.J. at 41 (1983).

For these reasons the circumstances under which a business will be subjected to the extraordinary expense of a Section 2 inquiry should be carefully drawn. The Court's giving credence to the notion of a submarket, which excludes a provider of identical services, imposes an unwarranted expense upon American business by encouraging litigants to pursue claims under circumstances where there is no harm to competition.

In the instant case, there simply can be no threat to competition precisely because IBM and CDC provide identical services. Even if CDC were the only third party maintenance company, IBM's presence would prevent CDC from gaining power to control prices and exclude competition *because IBM provides the identical services.* There certainly is no barrier to entry since IBM is already offering the same services. If CDC sought to raise its prices above competitive levels, IBM could respond with a stroke of a pen by adjusting its prices. IBM's presence in the market restrains any potentially anticompetitive act which any other company in the market might undertake. Can anyone realistically believe CDC could possibly inflict any harm that § 2 was designed to prevent?

By suggesting litigants can define the revelant market so narrowly that it does not conform to economic reality, the *dictum* in *Brown Shoe* permits baseless actions by competitors who claim injury in the market where the injury could not result from the monoploy power which § 2 was intended to control. As a consequence, the courts and parties are saddled with the extraordinarily expensive and time consuming litigation necessitated by a full-blown § 2 inquiry.

By falling prey to the idea of submarket in this case, the Court of Appeals not only imposes a needless burden on all

those involved here, but also unnecessarily inhibits the use of Rule 56 to screen baseless § 2 claims in the future.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

DATED: September 16, 1985.

Respectfully submitted,

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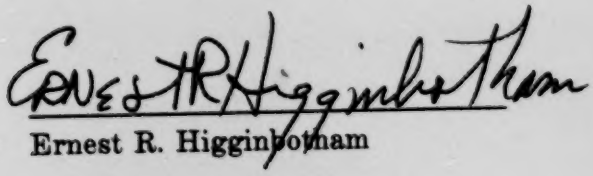

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION
CIVIL ACTION NO. 4-78-317K

C. E. SERVICES, INC.,

Plaintiff,

VS.

CONTROL DATA CORPORATION,

Defendant.

REVISED MEMORANDUM OPINION*

This action was brought by C. E. Services, Inc. against Control Data alleging violation of antitrust laws, and tortious interference with contractual and business relationships. Defendant filed a motion for summary judgment, and upon consideration of the pleadings, motions, briefs, affidavits, and oral argument, this Court is of the opinion partial summary judgment must be granted.

C. E. Services was incorporated in 1978 by former Control Data employees[1] in an attempt to enter the market for servicing and reconditioning of IBM Model 360 and 370 systems.[2]

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* Revised only as to grammar and citations.

[1] Mr. Russey — former sales and market representative in Control Data, now Vice President and Secretary/Treasurer of C. E. Services; Mr. McLeod — a former Dallas Branch Manager, now Vice President and Director of Technical Operations for C. E. Services; and Mr. Richardson — a former District Manager, now President of C. E. Services. Additionally, C. E. Services employs other Control Data alumni.

[2] IBM 360 and 370 systems refer to IBM computer systems with a series 360 or 370 central processing unit (CPU). Both the 360 series and the 370 series have a number of different models. The servicing of these models involves preventative and corrective maintenance

Initially, C. E. Services directed its customer search at Control Data (COMMA) customers,[3] and was apparently successful in securing five of Control Data's (COMMA's) clients, either as maintenance customers or serious prospects for C. E. Services maintenance.[4]

Upon learning of the attempted "defection" by its customers, COMMA contacted these clients and, in order to induce their continued patronage, offered a ten percent discount on a one year contract with a discount of five percent upon prepayment.[5] Through its efforts, COMMA was successful in retaining its customers, and C. E. Services was driven out from the maintenance business.[6]

As a result C. E. Services filed this suit contending Control Data monopolized or attempted to monopolize the "third-party" maintenance market in Tarrant and Dallas Counties for IBM Model 360 and 370 systems, and consequently, the acts of Control Data in winning back its customers from C. E. Services were in violation of Section Two of the Sherman Act. Plaintiff further alleged such acts of Defendant were in violation of the Common Law as they interfered with contractual and business relationships.

(including both labor and parts). The reconditioning involves the providing of parts and services to install, remove, reconfigure, recondition or enhance computer systems.

[3] COMMA, a wholly owned subsidiary of Control Data, was the entity providing the computer servicing for Control Data.

[4] Three customers had committed to C. E., and two others were strongly considering C. E.

[5] Prior to this time, only month to month service contracts had been available.

[6] C E. Services has since re-entered the maintenance business.

I The Antitrust Issue

Plaintiff has alleged COMMA monopolized or attempted to monopolize the third party maintenance market for IBM model 360 and 370 computers. The term "third party" refers to a maintenance company, besides IBM, doing such work on IBM model 360 and 370 computers. The third party maintenance companies in the Fort Worth/Dallas area are Control Data/COMMA, Raythean, Sorbus, and C. E. Services.

It is undisputed by the parties that during the period in question, IBM serviced in excess of sixty percent of all IBM Model 360 and 370 systems in Tarrant and Dallas Counties. IBM established the technical standards for maintenance services, and by virtue of its dominant position, set the "ceiling" prices to be charged for IBM maintenance work. The term "ceiling" as used refers to a twenty to twenty-five percent premium IBM commands for its services over the fees of third parties. Therefore, the fee a third party service company can realistically expect to receive would be approximately seventy-five to eighty percent of the amount IBM charges.

Of IBM Model 360 and 370 systems in the Tarrant and Dallas County area serviced by a third party, Control Data had approximately eighty-three percent of the market, Sorbus approximately fourteen percent and Raytheon approximately three percent.

In *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), the Supreme Court summarized a Section Two monopolization offense as requiring (1) possession of monopoly power, (2) in the relevant market, and (3) a wilful acquisition or maintenance of that power (as distinguished from growth or development). *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1366 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977).

In order to prove attempted monopolization, it must be shown (1) an intent on the defendant's part to bring about a

monopoly (2) within a defined relevant market, and (3) a dangerous probability of success. *Swift & Co. v. United States,* 196 U.S. 375, 396 (1905); *Yoder Bros., supra,* 537 F. 2d at 1368.

A. *Relevant Market*

Critical to Plaintiff's allegations of monopolization or attempted monopolization is the determination of the relevant market. *Grinnel Corp., supra,* 384 U.S. at 570-71 (1966); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Company, Inc.,* 614 F. 2d 832, 840 (2nd Cir. 1980). C. E. Services bears the burden of proving the boundaries of the relevant market. *United States v. E. I. DuPont de Nemours & Co.,* 351 U.S. 377, 381 (1956). The relevant market is defined in terms of a geographic market and a product market. *Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).*

B. *Relevant Geographic Market*

It is uncontested that the relevant geographic market is the Tarrant-Dallas County area. Given the logistics of computer servicing, the extensive travel necessary to consider a larger geographic market would be economically unfeasible.

C. *Relevant Product Market*

Controversy has arisen in the definition of the relevant product market. C. E. Services contends a sub-market exists in the IBM model 360 and 370 system servicing market, exclusive of IBM. Such a designation of third party maintenance companies as a "sub-market" of all maintenance companies would give Control Data approximately eighty-three percent of the relevant market. If IBM is included, Control Data's market share would be approximately twenty to twenty-five percent. Relevant market definition is therefore a critical factor; for as Judge Learned Hand observed, a ninety percent share of the market is clearly a monopoly, but it is doubtful whether a sixty

percent or sixty-four percent share would be enough, and thirty-three percent is clearly insufficient. *United States v. Aluminum Co. of America,* 148 F. 2d 416, 424 (2nd Cir. 1945). Additionally, a fifty percent share has been found inadequate, *Continental Baking Co. v. Old Homestead Bread Co.,* 476 F. 2d 97, 104 (10th Cir. 1973), *cert. denied,* 414 U.S. 975 (1973); *Cliff Food Stores, Inc.* v. Kroger, 417 F. 2d 203, 207 (5th Cir. 1969); *cf. Twin City Sportserv v. Charles O. Finley & Co.,* 512 F. 2d 1264, 1274 (9th Cir. 1975).

Defining a relevant product market involves describing those groups of producers which, because of the similarity of their products, have the ability — actual or potential to take significant amounts of business away from each other. *SmithKline Corp. v. Eli Lilly Co.,* 575 F. 2d 1056, 1063 (3rd Cir. 1978). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, supra,* 370 U.S. at 325.

"... [I]nterchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities."[7] *E. I. DuPont de Nemours, supra,* 351 U.S. at 380-81. "If the difference in the two products' price, use, and qualities become too great, then they can no longer be said to be reasonably interchangeable." *Yoder Bros., supra,* 537 F. 2d at 1366.

Therefore, it is ultimately the range of meaningful *competition* which must be determined to allow a definition of the product market. *United States v. Continental Can Co.,* 378 U.S. 441, 449 (1964). In making such determination, it is clear

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[7] Similarly, "one evidence of cross-elasticity is the responsiveness of sales of one product to price changes of another." *Telex Corp. v. IBM,* 510 F. 2d 894, 917 (10th Cir. 1975).

every case will require an *ad hoc* analysis, for the varying circumstances of each case will determine the result. *E. I. DuPont de Nemours, supra,* 351 U.S. at 395; *cf. Acme Precision Products Inc. v. American Alloys Corp.,* 484 F. 2d 1237, 1241 (8th Cir. 1973).

As the Supreme Court noted in *Brown Shoe,* within a broad market certain well-defined sub-markets may exist which, in themselves, constitute product markets for antitrust purposes. Indicative of a sub-market would be:

(1) industry or public recognition,

(2) peculiar characteristics and uses,

(3) unique facilities,

(4) distinct customers,

(5) distinct prices,

(6) sensitivity to price changes, or

(7) specialized vendors

Id., 370 U.S. at 325; *cf., Heatransfer Corp. v. Volkswagenwerk, A.G.,* 553 F. 2d 964, 980 (5th Cir. 1977).

Plaintiff contends the *Brown Shoe* criteria have been met and the presence of a sub-market indicated. This Court does not agree. First, an owner/operator of an IBM model 360 or 370 system could be serviced either by IBM or a third party. There are no distinct differences between customers, and no distinct differences in the services offered by the service companies (vendors). IBM is simply larger than all the rest combined, and COMMA is the largest of the remaining companies. This will not, in and of itself, set the two into different product markets.

Second, while price differentials have been found to be very significant in distinguishing market limits, they are not alone

determinative of a sub-market. In *Brown Shoe*, the Government challenged a proposed merger between Brown Shoe and another shoe company contending it would create a risk of monopolization and adversely affect competition. While Brown Shoe contended the two companies competed in different product markets, medium-priced shoes and low-priced shoes, the Court found a division of product lines based on price/quality would be realistic. *Id.*, 370 U.S. at 326.

The court in *Nifty Foods Corp.* relied on the *Brown Shoe* decision in determining the relevant market for frozen waffles. Nifty Foods claimed two relevant sub-markets were created in the frozen waffle market by virtue of the higher cost of the brand name waffle over the private label waffles. The Second Circuit felt it would be unrealistic to make a division where the two types of waffles were sold side by side in the same frozen food cases and distinguished only by label and price, and not by quality. Despite the fact that private label waffles were sold only to large volume wholesale customers, the private label and the brand name waffles competed directly at the retail level. *Nifty Foods Corp., supra,* 614 F.2d at 840.

In an earlier case, *America Crystal Sugar Co. v. Cuba American Sugar Co.,* 259 F. 2d 524 (1958), the Second Circuit found a line of commerce to be both refined cane and beet sugar despite a historical price difference in the two. While a separate buyer demand existed for cane and beet sugar, the Court felt such separate demand was not an indication of a lack of competition between the two, "but only that for the time being as to certain customers one or the other form of the product for one reason or another has forged ahead in the competitive race." *Id.*, at 530. Sensitivity to price changes, not price differential, is the proper element to measure cross-elasticity of demand. *Id.*

The court in *Photovest Corp. v. Fotomat Corp.,* 606 F. 2d 704 (7th Cir. 1979) found drive-thru photo processing to be a

relevant sub-market as compared to other forms of retail film processing. Fotomat charged at least a twenty percent premium over conventional forms of retailing and yet, still was expanding its share of the retailing and developing business. Expert testimony indicated a distinction was warranted based on the convenience and service of the drive-thru kiosks. Thus, while the Court in *Photovest* found distinctive prices to be an important factor suggesting delineation of drive-thru outlets as a sub-market, it appeared consumer perception of the drive-thru outlets as a separate sub-market, based on their *convenience* and *service* was the key factor allowing Fotomat to charge its higher prices.

Similar price differentials were found significant in defining the sub-market in *Avnet, Inc. v. JTC,* 511 F. 2nd 70 (7th Cir. 1975), where rebuilt and reconditioned used automobile components varied from twenty-five to fifty percent below prices for comparable new items. Of perhaps greater importance was the Commission's finding of an absence of any substantial interaction in price between the new and used/rebuilt lines. Thus, the findings in *Avnet* indicate an industry and customer perception of the used/rebuilt component market as a separate sub-market from the new component sub-market, and the price differentials merely a manifestation of that perception.

Here, the price differential may be attributed to numerous possible factors: IBM's technical domination, consumer preference, and/or established business relationships. The important factor, however, is the services offered are interchangeable as are the customers. A price differential alone will not support plantiff's definition of the relevant market.

Third, as contended by plaintiff, IBM sets the industry standards, and is able to command a premium for its services. It is IBM which controls the market price; COMMA must structure its prices according to IBM's actions. It cannot therefore be said COMMA has the power to raise prices or to

exclude competition when desired so as to indicate the presence of potential monopoly power. *American Tobacco Co. v. United States*, 328 U. S. 781, 811 (1946); *Texas Corp. v. IBM*, 510 F. 2d 894, 919 (10th Cir. 1975).

In the case *sub-judice*, distinct prices is the only *Brown Shoe* criteria which can be shown to support plaintiff's contention a separate sub-market value exists. From a reading of the cases, however, such contention must fail. It would be unrealistic for this court to place competitors in different relevant markets where the service provided is the same and the potential customers are the same. The similarities indicate beyond a doubt the services offered by IBM on the one hand and COMMA, C. E. Services, and the other Third Party Service companies on the other, are reasonably interchangeable. As the courts discussed in *Brown Shoe*, *E. I. DuPont de Nemours*, and *Yoder Bros.*, *supra*, that standard is the test. This Court could not place these companies in separate markets for antitrust purposes where the ability exists, actual or potential, to take significant amounts of business away from each other. *SmithKline Corp.*, *supra*, 575 F. 2d at 1063. Price differentials alone are not enough to refute interchangeability. *Brown Shoe*, *supra*; *Nifty Foods Corp.*, *supra*; *American Crystals Sugar Co.*, *supra*. *Photovest* involved a difference in services offered, and *Avnet* involved a product difference (new versus reconditioned).

This Court is therefore of the opinion where the only distinction between service companies is one of price, and the customers competed for and the services provided are the same, then all service companies should be included in the relevant market for antitrust purposes. With the inclusion of all IBM model 360 and 370 service companies, COMMA commands approximately twenty to twenty-five percent of the relevant market insufficient for plaintiff to pursue its antitrust allegations of monopolization or attempted monopolization of the relevant market.

Accordingly, defendant's motion for summary judgment will be granted as to the antitrust allegations.

II. The Common Law Claims

Plaintiff has additionally alleged the actions of defendant, in persuading the five clients in question to return to or remain with COMMA were in violation of the Texas Common Law as an interference with contractual and business relationships. Furthermore, plaintiff contends such actions constituted an unfair method of competition.

A. *Interference with Contractual Rights*

The general rule is there must be in existence a valid contract subject to interference. *Glenn v. Gidel*, 496 S.W. 2d 692, 707 (Tex. Civ. App. — Amarillo 1973, no writ); *cf. Armendariz v. Mora*, 553 S.W. 2d 400, 404 (Tex. Civ. App. — El Paso 1977, writ ref'd n.r.e.).

To maintain an action for interference with a contract, it must be established (1) it was a contract subject to interference, (2) the act of interference was wilful and intentional, (3) such intentional act was a proximate cause of plaintiff's damages, and (4) actual damage or loss occured. *Id.* If these four criteria are present, a prima facie case is established.

The Restatement, Second, of Torts, § 768 (1979) addresses the subject differently, stating: (1) one who intentionally causes a third person . . . not to continue an existing contract terminable at will does not interfere improperly with the other's relation if,

> (a) the relation concerns a matter involved in the competition between the actor and the other, and
>
> (b) the actor does not employ wrongful means, and,

(c) his action does not create or continue an unlawful restraint of trade, and

(d) his purpose is at least in part to advance his interest in competing with the other.

(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference, if the contract in not terminable at will.

Under either Texas Law or the Restatement, a defendant may justify his actions in the name of competition as long as no illegal or deceptive means are employed; however, competition alone will not excuse the defendant from liability where a contract is not terminable at will. *Id.,* at (2); *Raymond v. Yarrington,* 96 Tex. 443, 445, 73 S.W. 800, 802 (1903).

In the cause *sub-judice,* plaintiff will be entitled to damages for the duration of the contracts defendant is alleged to have induced the third parties to breach. That a contract had but a short time to run when the breach occurred does not affect the question of liability, but only the question of damages. 33 *Tex. Jur. 2d, Interference* § 3 (1962); *Raymond, supra,* 96 Tex. at 447, 73 S.W. at 804. Plaintiff may also be entitled to punitive damages should malice or ill will be established. *Clements v. Withers,* 437 S.W. 2d 818, 822 (Tex. 1969). *See also: Restatement, Second, of Torts,* § 767, (1979); *Ulan v. Vend-a-Coin, Inc.,* 27 Ariz. App. 713, 558 p. 2d 741, 745 (1976). Accordingly, summary judgement cannot be entered as to the contractual claims.

B. *Interference With Business Relations*

To establish a cause of action for tortious interference with contractual or business relationships, it need not be absolutely certain the prospective contract would have been made were it not for such interference. A reasonable assurance thereof in view of all the circumstances is generally sufficient. *Cooper v.*

Steen, 318 S.W. 2d 750, 757 (Tex. Civ. App. — Tyler 1971, writ ref'd n.r.e.) and (2) improper means were used, *Davis v. Lewis*, 487 S.W. 2d 411, 414 (Texas. Civ. App. — Amarillo 1972, no writ). Thus, the burden of establishing a prima facie case is higher than that required for interference with existing contracts.

To establish justification, the bona fide furtherance of one's general business interest in sufficient to negate libility as long as no action was taken that was otherwise unlawful. Additionally, all conditions which would justify an interference with existing contracts would apply to interference with business relations. *See Restatement, Second, of Torts*, § 768, Comment on Clause (d) (1979).

As a competitor of C. E. Services, COMMA is in a privileged position, and connot be found liable for interference with business relationships under the facts alleged.

Accordingly, Summary Judgement will be entered for defendant on the claims of interference with business relationships.

IT IS SO ORDERED.

Signed this 19 day of April, 1981.

DAVID O. BELEW, JR.

David O. Belew, Jr.
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

CIVIL ACTION NO. 4-78-317-K

C. E. SERVICES, INC.,

Plaintiff,

v.

CONTROL DATA CORPORATION,

Defendant.

SUPPLEMENTAL MEMORANDUM OPINION

This action was brought by C. E. Services, Inc. against Control Data Corporation alleging a violation of the federal antitrust laws, along with common law tortious interference with business and contractual relationships and unfair competition. On January 6, 1981, the Court entered Order Granting Partial Summary Judgment for the Defendant, in which it granted defendant's Motion for Summary Judgment as to plaintiff's antitrust claim and common law claim of interference with business relationships, but denied defendant's Motion for Summary Judgment as to plaintiff's common law claim of interference with contractual relationships.

Upon reconsideration, this Court is of the opinion that summary judgment for the defendant must be granted on all claims in the First Amended Complaint of C. E. Services, Inc. Accordingly, the Court's Memorandum Opinion of January 6, 1981, is hereby modified and supplemented with respect to the common law claims as follows:

The Common Law Claims

Plaintiff has alleged that the actions of defendant in persuading five specific customers to return to or remain with defendant were in violation of Texas Common Law as an interference with contractual and business relationships. Plaintiff also contends defendant's conduct constituted an unfair method of competition.

Interference with Contractual Rights

The general rule is that for there to be a right of action against one for contractual interference, there must be in existence a valid contract subject to interference. *Glenn v. Gidel,* 496 S.W.2d 692, 701 (Tex. Civ. App. — Amarillo 1973, no writ). While contracts terminable at will or upon thirty or as much as sixty days notice are no doubt valid contracts, Texas courts have held that persons who are not parties to such terminable contracts are privileged to persuade or attempt to persuade a party to the contract to terminate it by giving the required notice. *E.g., Davis v. Alwac International, Inc.,* 369 S.W.2d 797, 802 (Tex. Civ. App. — Beaumont 1963, writ ref'd n.r.e.); *Kingsberry v. Phillips Petroleum Co.,* 315 S.W.2d 561, 576 (Tex. Civ. App. — Austin 1958, writ ref'd n.r.e.). In this case it is undisputed plaintiff's contracts were terminable upon thirty days notice. Accordingly, under Texas law defendant had a legal right to attempt to persuade those customers to exercise their rights to terminate such contracts. This appears to be a well-reasoned rule which should be applied in this case. A contrary rule would give a party to a contract greater rights against third persons than against the other party to the contract.

Under both Texas law and the Restatement (Second) of Torts, a defendant may justify "interference" as long as no illegal or deceptive means are employed. In this case the undisputed material facts reveal that the actions of defendants

were justified. The following are among the factors which have been held to constitute justification: (1) Actions taken in bona fide exercise of one's own rights, *CF & I Steel Corp. v. Pete Sublett and Co.*, 623 S.W.2d 709, 715 (Tex. Civ. App. — Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Terry v. Zachry*, 272 S.W.2d 157, 159 (Tex. Civ. App. — San Antonio 1954, writ ref'd n.r.e.); (2) an equal or superior interest to that of the plaintiff in the subject matter, *Terry v. Zachry, supra*, 272 S.W2d at 159; (3) economic involvement with the contract at issue, *Davis v. Alwac International, Inc. supra*, 369 S.W.2d at 801-02; (4) a legitimate purpose of one's own, *Delz v. Winfree*, 80 Tex. 400, 16 S.W. 111, 112 (1891); *Kingsberry v. Phillips Petroleum co., supra*, 315 S.W.2d at 576; or (5) a separate, and particularly a prior, contract with the third party, *White v. Larson*, 586 S.W. 2d 212, 215 (Tex. Civ. App. — El Paso 1979, no writ).

Viewing the facts in the light most favorable to plaintiff, defendant's conduct was justified in the context of the criteria enumerated above. Plaintiff's customer search was directed exclusively at defendant's customers. Plaintiff's only success in acquiring customers was with customers who were parties to maintenance contracts with defendant. The Court finds nothing inherently unlawful, wrongful or mailicious in the price discounts of "long-term" contracts defendant offered its defecting customers, and further, the Court finds defendant had an equal, if not a superior, interest in such customers. Therefore, any "interference" by defendant with the contracts between plaintiff and those customers was justified as a matter of law.

Plaintiff has alleged defendant acted maliciously and with the intent to put plaintiff out of the maintenance business. Because the alleged acts of defendant are not, in and of themselves, unlawful and because those acts, even if committed, are justified, whether defendant may have been motivated by malice is, under the circumstances, irrelevant. *Garza V.*

Mitchell, 607 S.W.2d 593, 600 (Tex. Civ. App. — Tyler 1980, no writ); *Kingsbery v. Phillips Petroleum Co., supra,* 315 S.W.2d at 576.

Additionally, it is undisputed that plaintiff, acting in its own self-interest, did not press the customers or seek to enforce its contractual rights when advised the customers would remain with defendant. *See* Russey deposition, Vo. III, pp. 491-93. Thus, plaintiff's conduct constitutes a waiver of its claim, if any, for interference with contractual rights. Additionally, any "interference" by defendant had no effect on plaintiff's rights under these contracts, therefore, the essential element of actual damage or loss to plaintiff is missing from plaintiff's claims.

Accordingly, for all of the foregoing reasons, summary judgment in favor of defendant must be granted as to plaintiff's claims for interference with contractual rights.

Unfair Competition

Since it failed to establish interference with contractual rights or business relationships, plaintiff's unfair competition claim must rest upon its allegations that defendant offered unreasonably low prices and discounts and sought long-term contracts with potential customers.

Such conduct cannot be termed unlawful or in itself violative of plaintiff's rights. In short, no reported Texas case has upheld recovery on an unfair competition claim under facts similar to any of those here alleged by plaintiff. Even viewing defendant's conduct in the light most favorable to plaintiff, such conduct falls within the permissible bounds of competitive behavior. *See Synercom Technology, Inc. v. University Computing Co.,* 474 F. Supp. 37 (N.D. Tex. 1979); *Pioneer Oil Co. v. Ray E. McNutt Oil Co.,* 496 S.W.2d 157 (Tex. Civ. App. — El

Paso 1973, no writ); *Robison V. Texas Pine Land Ass'n,* 40 S.W. 843 (Tex. Civ. App. 1897, no writ).

Accordingly, Summary Judgment will be entered for defendant on the claim of unfair method of competition.

Conclusion

For the reasons stated herein and in the Memorandum Opinion of January 6, 1981, defendant is granted summary judgment on all claims in the First Amended Complaint of C. E. Services, Inc.

IT IS SO ORDERED.

Signed this 8 day of August, 1982.

DAVID O. BELEW, JR.

David O. Belew, Jr.
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

CIVIL ACTION NO. 4-78-317K

C. E. SERVICES, INC.,

Plaintiff

v.

CONTROL DATA CORPORATION,

Defendant.

FINAL JUDGMENT

This action came on for hearing before the Court upon Defendant's Motion for Summary Judgment as to all claims in the FIRST AMENDED COMPLAINT OF C. E. SERVICES, INC. All questions raised by that Motion were duly briefed and heard; and the Court, in its ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR THE DEFENDANT and SUPPLEMENTAL ORDER GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT, granted the Motion in all respects.

For the reasons stated in the Court's MEMORANDUM OPINION and SUPPLEMENTAL MEMORANDUM OPINION, those orders granting summary judgment finally dispose of all claims in the FIRST AMENDED COMPLAINT OF C. E. SERVICES, INC. The Court has expressly determined, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in entering and has therefore ordered entry of final judgment in favor of Defendant on all claims asserted in Plaintiff's FIRST AMENDED COMPLAINT.

IT IS THEREFORE ORDERED that final judgment be and hereby is entered in favor of Control Data Corporation and against C. E. Services, Inc. dismissing with prejudice, on the merits, the FIRST AMENDED COMPLAINT OF C. E. SERVICES. INC. and all claims which were or could have been asserted therein.

SIGNED this 8th day of August, 1983.

DAVID O. BELEW, JR.

David O. Belew, Jr.
United States District Judge

APPENDIX B

CORRECTED

C. E. SERVICES, INC. v. CONTROL DATA CORP.

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

C. E. SERVICES, INC.,
Plaintiff-Appellant,

v.

CONTROL DATA CORPORATION,
Defendant-Appellee.

No. 83-1632.

United States Court of Appeals,
Fifth Circuit.

May 13, 1985

Plaintiff computer maintenance firm brought antitrust action against defendant firm alleging that latter's conduct violated the Sherman Anti-Trust Act as well as state common-law norms prohibiting interference with existing contractual and prospective business relationships. The United States District Court for the Northern District of Texas, David O. Belew, Jr., J., entered judgment in favor of defendant, and plaintiff appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) plaintiff computer maintenance firm produced sufficient factual showing of significant probative force with regard to both relevant market for computer maintenance services and predatory nature of defendant's competitive pricing to preclude summary judgment, and (2) question of fact as to whether defendant's competitive price-cutting sank to unfair levels within reach of Texas' common law of tortious interference with prospective business relations precluded summary judgment in its favor.

Affirmed in part and reversed and remanded in part.

1. Monopolies Key 12(1.3)

Monopoly power, within meaning of Sherman Anti-Trust Act section prohibiting monopolization or the attempt to monopolize any part of the trade or commerce among the several states, is the power to control price or exclude competition. Sherman Anti-Trust Act. § 2, 15 U.S.C.A. § 2.

2. Monopolies Key 12(1.3)

Offense of completed monopolization under Sherman Anti-Trust Act section requires proof of two elements: possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Sherman Anti-Trust Act, § 2,15 U.S.C.A. § 2.

3. Monopolies Key 12(1.3)

Plaintiff proceeding under Sherman Anti-Trust Act section 2 must prove two elements for attempt offense: specific intent to accomplish illegal result, and a dangerous probability that the attempt will be successful. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

4. Monopolies Key 12(1.3)

A prerequisite to success under Sherman Anti-Trust Act section 2 on either a completed or attempted monopolization claim is proof of the relevant market. Sherman Anti-Trust Act, § 2, 15 U.S,C,A, § 2.

5. Monopolies Key 12(1.3)

Relevant market inquiry, under Sherman Anti-Trust Act section 2, has both geographical and product elements, as to which plaintiff bears burden of proof. Sherman Anti-Trust Act, § 2, 15 U.S.C.A § 2.

6. Federal Civil Procedure Key 2464

Summary judgement is especially disfavored in complex, fact-sensitive antitrust cases, but requirements of summary judgment rule are no less applicable in such actions. Fed. Rules Civ.Proc.Rule 56, 28 U.S.C.A.; Sherman Anti-Trust Act, § 2, 15, U.S.C.A. § 2.

7. Monopolies Key 12(1.3)

Acquisition of or attempt to acquire monopoly power is illegal only if not accomplished by legitimate means such as product, business acumen or historic accident. Sherman Anti-Trust Act, § 2, 15, U.S.C.A. § 2.

8. Federal Civil Procedure Key 2484

Plaintiff computer maintenance firm produced sufficient factual showing of significant probative force with regard of both relevant market for computer maintenance service and predatory nature of defendant computer maintenance firm's competitive pricing to preclude summary judgment for defendant on plantiff's theories of antitrust liability under Sherman Anti-Trust Act section 2. Sherman Anti-Trust Act, § 2, 15, U.S.C.A. § 2.

9. Torts Key 12

A third-party's efforts to induce another to exercise his right to dissolve a contract at will or to terminate contractual relations on notice does not constitute tortious interference with contract under Texas law.

10. Torts Key 27

In absence of evidence that defendant computer maintenance firm's solicitations of plaintiff computer maintenance firm's customers had any effect other than to cause those clients to tender their 30-day notices under terms of their contracts,

defendant failed to make out a prima facie case under Texas law for wrongful interference with contract.

11. Torts Key 12

Elements of tortious interference with prospective contractual relations under Texas law are that: there was a reasonable probability that plaintiff would have entered into a contractual relationship; defendant acted maliciously by intentionally preventing the relationship from occurring with purpose of harming plaintiff; defendant was not priviledged or justified, and actual harm or damage occurred as a result.

12. Torts Key 12

For purposes of element of establishing tortious interference with prospective contractual relations under Texas law, namely, that defendant was not privileged or justified, competitive motive, while perhaps the start of the inquiry, is not of itself sufficient privilege or justification for interference with prospective business relations; only "fair" competition will do.

13. Federal Civil Procedure Key 2515

Question of fact as to whether defendant computer maintenance firm's competitive price-cutting sank to unfair levels within reach of Texas' common law of tortious interference with prospective business relations precluded summary judgment in its favor in suit by plaintiff computer maintenance firm.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, GOLDBERG and RUBIN, Circuit Judges.

GOLDBERG, Circuit Judge:

IBM makes machines, and machines break down. Seizing on this windfall opportunity, others have joined IBM in the mission to keep our nation's computers running. These somewhat parasitic entities are called "third-party maintenance firms."

Defendant-appellee Control Data Corporation is in the business of providing maintenance services for IBM 360 and 370 systems in the Dallas-Tarrant County area of Texas. In the summer of 1978, three employees of Control Data left the firm to form plaintiff-appellant C.E. Services, Inc. ("CES"), which in July of that year joined the IBM computer maintenance business, providing the same repair services as Control Data, other third-party maintenance firms, and IBM itself.

CES entered the world of third-party maintenance with a bang, soliciting customers from among those who were already aware of the capabilities of the former Control Data employees — that is, they seduced Control Data's clients. Ultimately, three of Control Data's clients cancelled their month-to-month contracts with the firm after having tendered their contractually required thirty-day notices of cancellation. By August of 1978, two additional Control Data customers had become serious propects for CES.

Control Data responded in kind. As the result of an organizational meeting that August, the company contacted the CES converts and prospective converts in an effort to persuade them to return to or remain with Control Data. It offered to each a ten-percent price discount in exchange for a one-year obligation instead of the usual month-to-month agreements. The new discount supplemented a traditional five-percent discount that had been available to customers paying for an entire year's maintenance contract in advance.

The tactic apparently was effective, as CES went out of business for approximately one year. (Interestingly, the de-

ceased revived: in 1979, CES obtained two maintenance customers from Control Data, at least one of which switched because CES offered to perform at a price lower than Control Data's.) Desolate and with no one else to turn to, CES filed suit in federal district court, alleging that Control Data's conduct violated section 2 of the Sherman Act, 15, U.S.C. § 2 (1982), as well as state common law norms prohibiting interference with existing contractual and prospective business relationships. The district court eventually dismissed each claim on summary judgment and, severing the remaining counterclaims and third-party claims, entered a final judgment as to plaintiff's claims pursuant to Fed.R.Civ.P. 54(b). Because we believe that summary judgment was improperly granted as to the federal antitrust claims as well as to one of plaintiff's state law claims, we reverse and remand for a trial on these issues.

I. MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION

[1-3] Section 2 of the Sherman Act brands as outlaw "[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . ." 15 U.S.C. § 2. Monopoly power, in turn, is "the power to control price or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1004-05, 100 L.Ed. 1264 (1956). The offense of completed monopolization requires proof of two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). Similarly, the section 2 plaintiff must prove two elements for the attempt offense: (1) specific intent to accomplish the illegal result, and (2) a dangerous probability that the attempt will be successful.

United States v. American Airlines, Inc., 743 F.2d 1114, 1118 (5th Cir.1984); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 490 (5th Cir.1984); *Spectrofuge Corp. v. Beckman Industries, Inc.*, 575 F.2d 256, 276 (5th Cir.1978), *cert. denied*, 440 U.S. 393, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979).

[4, 5] A prerequisite to success under section 2 on either a completed or attempted monopolization claim is proof of the relevant market. *E.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 350, 15 L.Ed.2d 247 (1965); *Spectrofuge Corp.*, 575 F.2d at 276. "The relevant market establishes the backdrop against which to measure economic power." *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir.1982). The relevant market inquiry, of course, has both geographical and product elements, *Domed Stadium*, 732 F.2d at 487, as to which the plaintiff bears the burden of proof, *du Pont*, 351 U.S. at 381, 76 S.Ct. at 999.

[6] Because this case comes to us on summary judgment, our analysis of the relevant service[1] market is necessarily circumscribed. The moving party must have shown, in light of the entire record, that there was no genuine issue as to any material fact and that the district court was therefore justified in entering judgment as a matter of law. Fed.R.Civ.P. 56(c); *e.g., Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962). This inquiry involves competing considerations. On the one hand, we must draw all reasonable inferences in favor of the party opposing the motion, *e.g., United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam), but on the

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[1] Section 2's proscription applies with equal force to both service and product markets. *See, e.g., United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 659-62, 94 S.Ct. 2788, 2791-93, 41 L.Ed.2d 1016 (1974); *Grinnell*, 384 U.S. at 572-76, 86 S.Ct. at 1704-05.

other hand, the nonmoving litigant must point to "significant probative evidence" demonstrating the existence of a triable issue of fact, *e.g., Municipal Bond,* 672 F.2d at 440. On the one hand, summary judgment is especially disfavored in "complex, fact-sensitive antitrust cases," *see Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 505, 89 S.Ct. 1252, 1259-60, 22 L.Ed.2d 495 (1969); *Poller,* 368 U.S. at 473, 82 S.Ct. at 491, but on the other hand, " 'simply because a case is based upon the antitrust laws does not suspend the application of Rule 56,' " *Domed Stadium,* 732 F.2d at 486 (quoting *Aladdin Oil v. Texaco, Inc.,* 603 F.2d 1107, 1111 (5th Cir.1979)). "In short, the requirements of Rule 56 are no less applicable in antitrust actions." *Municipal Bond,* 672 F.2d at 440; *see First National Bank of Arizona v. Cities Serv. Co.,* 391 U.S. 253, 287 n. 18, 88 S.Ct. 1575 (1968); *Bayou Bottling, Inc. v. Dr. Pepper Co.,* 725 F.2d 300, 303 (5th Cir.1984), *cert. denied,* — U.S. —, 105 S.Ct. 123, 83 L.Ed.2d 65. *See generally* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 316, at 57-59 (1978).

The parties do not contest that the relevant geographic market is the Dallas-Tarrant County area. CES maintains, however, that the relevant service market comprises only third-party maintenance firms, to the exclusion of IBM. On appellant's view, if third-party firms are found to constitute a distinct submarket for the maintenance of IBM 360 and 370 computers, then Control Data owns an 83% share of the relevant market. Appellee counters that IBM, which itself offers to maintain the 360 and 370 lines, furnishes a service indistinguishable from that of the third-party firms and should therefore be included in a unitary market for the maintenance of these machines. The consequence of appellee's market definition is that IBM's 60-65% share relegates Control Data to between 20 and 25%, thereby rendering appellant's section 2 claims unsustainable as a matter of law. *See Dimmitt Agri Industries v.* CPC *International, Inc.,* 679 F.2d 516 (5th

Cir.1982), *cert. denied,* 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983).[2]

We approach this issue with some trepidation, mindful of the ad hoc, fact-specific core embedded in any determination of relevant market. *See Heatransfer Corp. v. Volkswagenwerk,* A.G., 553 F.2d 964, 979 (5th Cir.1977), *cert. denied,* 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978); *Sulmeyer v. Coca Cola Co.,* 515 F.2d 835, 849 (5th Cir.1975), *cert. denied,* 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976). The oft-repeated bromide that courts are reluctant to dismiss cases on summary judgment is as much an observation as it is an admonishment. When appropriate, we will readily walk the efficient countours of Rule 56, but the nature of the antitrust beast is such that courts cannot frequently say as a matter of law that plaintiffs have no disputed material facts upon which to proceed to trial. The facts of this case prescribe that we swallow the bromide.

Appellee argues forcefully, as did the district court below, that because IBM and the third-party firms provide identical services, the third-party firms do not constitute a separate market for purposes of section 2. Appellee correctly avers to the delineation in *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962), in which the Supreme Court stated that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* 370 U.S. at 325, 82 S.Ct. at 1523-24

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[2] We find it unnecessary to decide whether a defendant's 25% share of the relevant market might be sufficient to sustain an attempted monopolization claim against it. *See Multiflex, Inc. v. Samuel Moore & Co.,* 709 F.2d 980, 990-94 (5th Cir.1983), *cert. denied,* — U.S. —, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984); *Dimmitt,* 679 F.2d at 531-33 & n. 18; *see also United States v. American Airlines, Inc.,* 743 F.2d 1114, 1118-21 (5th Cir. 1984).

(footnote omitted); *see NCAA v. Board of Regents*, — U.S. —, 104 S.Ct. 2948, 2966, 82 L.Ed.2d 70 (1984). Appellee claims that nothing in the record refutes that the services of IBM and of the third-party firms are reasonably interchangeable or reflect a high cross-elasticity of demand.

While identity of services undoubtedly plays a significant part in the relevant market determination, *Brown Shoe* and its progeny contemplate that a variety of factors will inform the analysis. Recognizing the possibility of valid subdivisions within an apparently overarching market definition, the *Brown Shoe* Court stated that within this broad market, well-defined submarkets may exist which . . . constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325, 82 St.Ct. at 1524 (citations omitted). The existence of one or more of these indices does not necessarily preclude a summary determination that certain products or services either are reasonably interchangeable or demonstrate a high cross-elasticity of demand. However, where a plaintiff has by substantial probative evidence raised fact issues material to the ultimate market definition the possibility that any single countervailing factor will outweigh these issues as a matter of law is slight.[3]

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[3] As we noted in *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1367 (5th Cir.1976), *cert. denied*, 429 U.S. 2094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977), "Factors such as functional interchangeability, responsiveness of the sales of one product to the price changes of the other, and degree of competition from the potential substitute are all relevant to the market inquiry." *See also Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1393 (5th Cir.1983).

In the present case, CES has presented affidavits, documentary evidence, and deposition testimony for the propositions that third-party maintenance firms view themselves collectively as a service industry apart from IBM; that the marketing and competitive strategies of Control Data in particular focused solely on other third-party firms to the exclusion of IBM; that consumers of third-party maintenance services do not readily substitute services from IBM (and that the converse is similarly untrue); that there is a ubiquitous price differential of some 20-25% between IBM's higher fees and those of the third-party firms; and that the third-party firms are, unlike IBM, specialized service vendors of the 360 and 370 computer systems.[4] Control Data disputes the veracity of each point,[5] but the resolution of these factual issues is for another place and another time. We cannot say at this inchoate stage that a

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[4] *See* Richardson Deposition at 237 — 38; Seidel Deposition at 9 — 10; Vander Luqt Deposition at 29; Richardson Affidavit at 5; Russey Affidavit at 5M— 6; Exhibits 176, 183, 186.

[5] Appellee does not dispute the existence of a differential between the prices of IBM and the third-party firms, but contends instead that the differential is irrelevant because CES has not shown how the price variance indicates the existence of a relevant submarket. While it is certainly true that a price differential is not necessarily dispositive in determining the interchangeability of products, *see, e.g., Acme Precision Prods. v. American Alloys Corp.*, 484 F.2d 1237, 1242 — 43 (8th Cir.1973), different prices are at least probative of the question whether different markets exist. Moreover, while we agree that price differentials are not in and of themselves significant except insofar as they suggest the existence of different markets, appellee misperceives the allocation of burdens on its motion for summary judgment. CES has produced evidence tending to show, in light of the record as a whole, that the price differential bears on the cross-elasticity of demand between third-parties services and IBM's. We cannot say, given the ad hoc significance of price differentials in determinations of relevant markets, that IBM's consistently higher prices do not suggest the existence of separate markets.

factfinder would be precluded from reasonably inferring the existence of a relevant submarket of third-party maintenance firms, nor could we say that judgment *non obstante verdicto* would necessarily follow a verdict excluding IBM from the relevant market.

[7] Control Data further contends that even if the district court erred by including IBM in the relevant market as a matter of law, we should nevertheless affirm [6] the dismissal of the antitrust claims on the ground that CES has not thrown into dispute the material issue of Control Data's exclusionary conduct.[7] Drawing on the principle that the acquisition of or attempt to acquire monopoly power is illegal only if not accomplished by legitimate means such as "product, business acumen, or historic accident," *Grinnell Corp.*, 384 U.S. at 570 — 71, 86 S.Ct. at 1704; *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 990 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984), appellee observes that CES's sole theory of exclusionary conduct — namely, that Control Data engaged in predatory pricing — is unsupported by the record.

[8] Pushing beyond our initial reluctance to pass on so fact-oriented an inquiry where the district court did not even speak

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[6] We are of course permitted to affirm a district court's grant of summary judgment on grounds other than those upon which the lower court relied. *E.g., Church of Scientology v. Cazares*, 638 F.2d 1272, 1281 (5th Cir.1981).

[7] *See generally* 3 P. Areeda and D. Turner *Antitrust Law* ¶ 626, at 83 (1978) (" 'Exclusionary' conduct is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaning monopoly power.").

to the issue,[8] we think that appellant has presented evidence from which it would be possible to conclude that it was devoured by Control Data's predation. It is at least debatable whether Control Data reduced prices some 20 — 20% below average variable cost to five customers or prospective customers of CES in an effort to recapture these service contracts.[9] The actual amounts of reduction and of average variable cost are matters peculiarly within the province of the jury to decide. *Sunshine Brooks, Ltd. v. Temple University,* 697 F.2d 90, 96 — 97 (3d Cir.1983).

Appellee attempts to bring this case within our holding in *Bayou Bottling, Inc. v. Dr Pepper Co.,* 725 F.2d 300 (5th Cir.1984), *cert. denied,* — U.S. —,105 S.Ct. 123, 83 L.Ed.2d 65 (1984). The reliance is misplaced. *Bayou Bottling* involved competing full-line soft drink dealers who sold a variety of drinks in a variety of sizes. The defendant was accused of lowering the price of 32-ounce bottles to below the average variable cost for these products — an action which, plaintiff maintained, constituted predatory pricing. In affirming summary judgment in favor of the defendant, we held that these competitors' average variable costs had to include the full product line. Quoting the Ninth Circuit's opinion in *Janich Bros., Inc. v. American Distilling Co.,* 570 F.2d 848, 856 (9th Cir.1977), *cert. denied,* 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978), we stated:

> "... The pricing of one size at a predatory level would not necessarily drive out rivals who were selling a full line, as is the case in this industry, unless this placed the overall price of the line at the predatory level."

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[8] Control Data's motion for summary judgment is silent on whether or not the record fails to support CES's theory of predation.

[9] *See* Rostron Deposition at 316 — 47, 348, 361; Exhibit 24.

Bayou Bottling, 725 F.2d at 305. The present case differs markedly in that appellee is alleged to have reduced the price of its maintenance services to predatory levels solely as to particular customers. Unlike in *Bayou Bottling,* where a full-line competitor would not have been unfairly threatened by the uniform decrease in price of a single product in its line appellant has produced evidence sufficient to support the possibility that Control Data's pricing of their "product" — maintenance services — was predatory as to CES, the sole victim of Control Data's lower prices. This would be precisely the type of "conduct designed to barricade access to markets ... [that] can constitute a proscribed means of monopolization." *Woods Exploring & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1307 (5th Cir.), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1971); *Walker v. U-Haul Co.,* 747 F.2d 1011, 1015 (5th Cir.1985).

In sum, appellant's scenario of monopolization is not so devoid of evidentiary support for the section 2 claims as have been those antitrust cases where we were willing to affirm dismissals on summary judgment. *See, e.g., Transource International, Inc. v. Trinity Industries,* 725 F.2d 274, 283-84 (5th Cir.1984); *Municipal Bond,* 672 F.2d at 440-43; *Parsons v. Ford Motor co.,* 669 F.2d 308, 313 (5th Cir.), *cert. denied,* 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982). On the contrary, CES has produced a sufficient factual showing of significant probative force with regard to both the relevant market for computer maintenance services and the predatory nature of Control Data's competitive pricing. *Cf. Powers v. Nassau Development Corp.,* 753 F.2d 457, 461-63 (5th Cir.1985). Consequently, we reverse the district court's grant of summary judgment on CES's theories of antiturst liability.

II. THE STATE LAW CLAIMS

Appellant contends that the district court should not have dismissed its state law tort claims for wrongful interference with contract and with prospective business relations. CES theorizes that Control Data intentionally procured the breach of contracts between CES and its new customers, and that Control Data further discouraged other soon-to-be customers of CES from finalizing their contractual relationships with the new company.

[9, 10] With regard to the claim for contractual interference, the district court held that CES has failed to make out a prima facie case under Texas law primarily on the ground that Control Data's actions fell within the realm of justifiable competition.[10] Without passing on the merits of this rationale, we find that the claim fails for lack of any indication in the

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[10] In Texas,

> " 'A prima facie case of wrongful interference with a contract is made out if there are alleged: (1) Intentional and willful acts; (2) calculated to cause damage to plaintiffs in their lawful business; (3) done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) actual damage and loss resulting.' "

White v. Larson, 586 S.W.2d 212, 215 (Tex.Civ.App.1979) (quoting *Tidal Western Oil Corp. v. Shakelford,* 297 S.W. 279, 280 (Tex.Civ.App.1927) (citation omitted)); *State Nat'l Bank V. Farah Mfg. Co.,* 678 S.W.2d 661, 689 (Tex.Ct.App.1984). In addition to holding under the third element that Control Data's actions were justifiable — a result with which we might differ absent any claim of contractual right by Control Data — the district court noted that "any 'interference' by defendant had no effect on plaintiff's right under these contracts; therefore, the essential element of actual damages or loss to plaintiff is missing from plaintiff's claims." *Supplemental Memorandum Opinion,* No. 4-78-317-K, *slip op.* at 5 (N.D.Tex.1983). Since we agree that CES has failed to establish its loss of any contractual right, we need not reach issues of judtification or malice.

record that CES's customers breached their contracts. A third-party's efforts to induce another to exercise his right to dissolve a contract at will or to terminate contractual relations on notice does not constitute tortious interference with contract under Texas law. *Claus v. Gyorkey,* 674 F.2d 427, 435 (5th Cir.1982); *Kingsbery v. Phillips Petroleum Co.,* 315 S.W.2d 561, 576 (Tex.Civ.App.1958); *see also* Restatement (Second) of Torts § 768(2) & comment *i* (1977). Viewing the evidence in the light most favorable to CES, we see no indication that Control Data's solicitations of CES customers had any effect other than to cause these clients to tender their thirty-day notices under the terms of their contracts. Any question of malicious intent to induce a contractual breach thus becomes irrelevant. As the Texas courts have aptly noted, " 'If an act be lawful . . . an improper motive does not render it unlawful . . . "Malicious motives make a bad case worse, but it [sic] cannot make that wrong which, in its own essence, is lawful." ' " *Kingsbery,* 315 W.2d at 5716 (citations omitted). Appellant has not produced evidence that its clients "breached" anything — they merely exercised their respective rights of termination as provided for in their contracts. *See Davis v. Alwac International, Inc.,* 369 S.W.2d 797, 802 (Tex.Civ.App.1963).[11]

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[11] Our recent decision in *Deauville Corp. v. Federated Dep't Stores, Inc.,* 756 F.2d 1183 (5th Cir.1985), is not to the contrary. In *Deauville,* we held that Texas law supports a claim for interference with a terminable-at-will contract where a third-party has induced the contract's breach without any economic justification or goal other than evisceration of the underlying contract. *Id.* at 1195-96. In our case, it is clear that, even viewing the facts most favorably to CES, Control Data's alleged interference was aimed at least as much toward retrieving its previous clients as it was toward abrogating CES's contractual relations. The Texas cases will not support a claim for tortious interference with contract under these circumstances.

[11] Beyond its argument for tortious interference with contract, CES lays claim to redress under the Texas law prohibiting interference with prospective contractual relations. We had occasion to examine this topic in some detail in *Leonard Duckworth, Inc. v. Michael L. Field & Co.*, 516 F.2d 952 (5th Cir.1975), where we observed that the Texas courts recognize claims for malicious interference with reasonably probable future contractual relations. *Id.* at 956; *see Phillips v. Vandygriff*, 711 F.2d 1217, 1230 (5th Cir.1983), *cert. denied*, — U.S. —, 105 S.Ct. 94, 83 L.Ed.2d 40 (1984); *Verkin v. Melroy*, 699 F.2d 729, 732-33 (5th Cir.1983). The elements of this breed of tortious interference, enumerated in *Duckworth* and since recognized expressly by the Texas courts, *see, e.g., State National Bank v. Farah Manufacturing Co.*, 678 S.W.2d 661, 688-90 (Tex.Ct.App.,1984); *Lone Star Steel Co. v. Wahl*, 636 S.W.2d 217, 222 (Tex.Ct.App.,1982), are that

> (1) there was a "reasonable probability" that [plaintiff] would have entered into a contractual relationship; (2) defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming plaintiff; (3) the defendant was not privileged or justified, and (4) actual harm or damage occurred as a result.

Duckworth, 516 F.2d at 956. In the present case, Control Data contends under the third element that it was "privileged or justified" in soliciting five prospective customers from CES because the motivating force underlying its action was competition, pure and simple.[12]

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[12] Appellee does not contest, nor did the district court pass upon, whether disputed issues of material fact remain as to any of the three remaining *Duckworth* factors. We thus view the merits of appellee's motion for summary judgment as turning solely on our resolution of the privilege or justification issue.

[12] Unfortunately for appellee, the argument deals no more than a glancing blow to its adversary's case. Competitive motive, while perhaps the start of the inquiry, is not of itself sufficient privilege or justification for interference with prospective business relations in Texas. Only "fair" competition will do, for " 'if there is sharp dealing or overreaching or other conduct below the behavior of fair men similarly situtated, the ensuing loss should be redressed,' " *Id.* at 958 (emphasis and citation omitted).[13]

[13] Fortunately for us, we do not have to decide whether Control Data's dealing cut too sharp, reached too far, or cast the spell of satanic intrigue that doubtless bedevils the jungle of computer repair. These remain open questions of material fact. *See Verkin,* 699 F.2d at 732-34. Control Data reduced its price for maintenance services by as much as 15% for those former clients who became customers of CES. For reasons similar to those discussed in the context of appellant's section 2 antitrust claims, it would be possible to conclude that Control Data reduced its prices to below cost with the intent of driving CES out of business.

III. CONCLUSION

Having failed to produce evidence of a contractual breach, CES is unable to sustain its claim against Control Data for wrongful interference with contract under Texas law. The record does contain evidence, however, from which a factfinder could reasonably decide not to include IBM in the relevant market for maintenance of IBM 360 and 370 computers in the Dallas-Tarrant County area. Control Data may therefore be

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[13] *See also Farah Mfg.,* 678 S.W.2d at 689 ("A justifiable business interest does not grant absolute privilege to interfere with a contractual relationship between others.") (citing *Frank Coulson, Inc.-Buick v. General Motors, Corp.,* 488 F.2d 202, 206 (5th Cir.1974)); Restatement (Second) of Torts § 768 (1979).

found to occupy a sufficiently high share of the relevant market to support CES's claims of monopolization and attempted monopolization. Similarly, it is debatable whether Control Data's competitive price-cutting sank to predatory levels within the meaning of section 2 of the Sherman Act, or to unfair levels within the reach of Texas's common law of tortious interference with prospective business relations. Consequently, the district court's grant of summary judgment is

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

APPENDIX C

C-1

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1632

D.C. Docket No. CA-4-78-0317-K

C. E. SERVICES, INC.,

Plaintiff-Appellant,

versus

CONTROL DATA CORPORATION,

Defendant-Apellee.

Appeal from the United States District court for the Northern District of Texas

Before CLARK, Chief Judge, GOLDBERG and RUBIN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal be taxed 75% against appellee and 25% against appellant, said costs to be taxed by the Clerk of this Court.

May 13, 1985

ISSUED AS MANDATE:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1632

C. E. SERVICES, INC.,

Plaintiff-Appellant,

versus

CONTROL DATA CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(June 18, 1985)

Before CLARK, Chief Judge, GOLDBERG and RUBIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

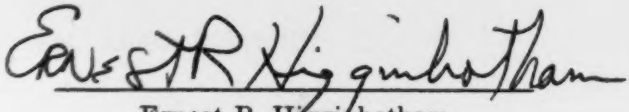
ENTERED FOR THE COURT:

Charles Clark

CHIEF JUDGE

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT have been forwarded via United States mail, postage prepaid, to Paul J. VanOsselaer, Esq., Shapiro, Edens & Cook, 2200 One American Center, 600 Congress Avenue, Austin, Texas 78701, attorney for respondent C.E. Services, Inc., on this the 16th day of September, 1985.



Ernest R. Higginbotham